No. 21,840

United States Court of Appeals

For the Ninth Circuit

EDWIN CORDEIRO and EDMUND LEWIS (individually and doing business as CORDEIRO AND LEWIS APPLIANCES),

Appellants,

vs.

AMERICAN HOME ASSURANCE COMPANY (a corporation),

Appellee.

Appeal from the Judgment of the United States District Court, Eastern District of California at Fresno, California

Honorable M. D. Crocker, Judge

APPELLANTS' OPENING BRIEF

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Subject Index

Table of Authorities Cited

Codes

Statutes

Texts

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I. JURISDICTION OF THE UNITED STATES COURT OF APPEALS.

This action was commenced in the Superior Court of the State of California in and for the County of Merced (CT 1-8) and on the petition of defendant (CT 11-14) was removed to the United States District Court for the Eastern District of California on the grounds of diversity of citizenship under the provisions of 28 United States Code Section 1441 (a).

The findings (CT 83:5-23) establish the requisite diversity and jurisdictional amount.

A final judgment was entered in favor of the defendant on February 23, 1967 (CT 87); a motion for new trial (CT 88-91) and motion for amendments to findings (CT 91-93) were filed March 6, 1967 and argued and denied on March 27, 1967 (CT 100). Notice of appeal to this Court was filed April 26, 1967 (CT 101-103).

This Court has jurisdiction under the provisions of Title 28, United States Code, Section 1291.

II. STATEMENT OF THE CASE.

This is an appeal by the plaintiffs from an adverse judgment in an action on a fire insurance policy.

Defendants issued to plaintiffs a fire insurance policy (Plaintiffs' Exhibit No. 6) on personal property in a store at 1032 Sixth Street, Los Banos, California, with a policy limit of $50,000; later, an endorsement added property at 1105 Sixth Street, Los Banos, with a purported limit of $25,000.

Fire destroyed the property at 1105 Sixth Street and plaintiffs sought in this action to compel defendant to pay plaintiffs the sum of $17,185.35 on account of a fire loss admittedly sustained by plaintiffs over and above the amount of $25,000 conceded by defendants to be payable (and paid) under Endorsement No. 1 of the policy (Plaintiffs' Exhibit No. 6) as written.

Plaintiffs relied on the doctrine of estoppel and mistake.

Findings of the trial court (CT 82-86) were adverse on both issues and judgment denying relief was entered (CT 87).

Plaintiffs' motion for new trial (CT 88-99) and motion for amendments to the findings under Rule 52 (b) were denied (CT 100) and this appeal followed.

III. SPECIFICATION OF ERRORS.

1. Defendant is estopped as a matter of law to deny coverage in an amount sufficient to indemnify plaintiffs for the conceded amount of their loss over and above the amount defendant claims is payable under the policy as written; the contrary finding (CT 85:27-29) is erroneous as a matter of law;

2. In view of the reporting form furnished plaintiffs by defendant, the terms of the policy which denied plaintiffs protection even though they were charged a premium for such protection were contrary to public policy; the implied finding (CT 84:10-14) that such a provision could cut down the protection the plaintiffs paid for, needed and had reason to believe they were receiving is contrary to law;

3. The finding (CT 84:16-20) that defendant's agent Hoffman "handled all the negotiations on behalf of both plaintiffs" and told plaintiffs "that the limit of liability on the fire insurance on the new location was $25,000.00" is not supported by substantial

evidence and is further insufficient to support the judgment in that it wholly fails to find whether plaintiffs knew or should have reasonably known or realized that their coverage at the new location was limited to $25,000;

4. The finding (CT 84:22-24) that plaintiff Edwin Cordeiro "never specifically requested insurance in any greater amount of [*sic*] the new location than $25,000" is confusing and contradictory;

5. It was error for the trial court to refuse to amend the findings in accordance with plaintiffs' motion (CT 91-93) and thus to enable plaintiffs and this Court to determine the basis for the trial court's determination that plaintiffs were not covered with respect to their conceded loss of $17,185.35 over and above the amount defendant contends is its limit of liability;

6. It was error for the trial court to deny plaintiffs' motion for new trial;

7. It was error for the trial court to sustain appellee's (defendant's) objection to examination of witness Girdlestone (vice-president in charge of property writing for defendant) on his familiarity with or use of Standard Form Bureau Form 448 (Plaintiffs' Exhibit No. 9 for identification); such evidence would have shown that a report form was known to defendant and was available for use but not used by defendant, and that, had it been used in this case, plaintiffs would have been put on immediate notice of the purported limitation of coverage on the new loca-

tion; objection was made on the ground that the evidence was "entirely immaterial" (RT 119:22-121:6).

IV. STATEMENT OF FACTS.

The following facts were established without substantial conflict in the evidence:

The plaintiffs, for many years prior to 1963, were doing a mercantile business as copartners at 1032 Sixth Street, Los Banos, California (RT 40-41). In describing the business plaintiff Cordeiro testified:

> "We had a full appliance line, sir, which includes white goods, refrigerators, freezers, washers and dryers and so on; also a TV line, which includes TVs and stereos and at that time no color and then we had a complete line of toys, housewares—now, housewares includes complete housewares, pots and pans and small appliances; we had a record department and giftware."
> (RT 41:16-22.)

For many years Harry Miller had been acquainted with the plaintiffs and had handled their insurance problems (RT 15:17-16:10). Miller was a general agent of the defendant insurance company (see Plaintiffs' Exhibits 1, 2, 3 and 4) and was in fact the agent who signed on behalf of the defendant the insurance policy involved in this litigation (Plaintiffs' Exhibit 6).

Under date of April 18, 1963 the defendant through agent Miller had issued to plaintiffs an insurance policy providing indemnity for damage to stock and equipment at the store located at 1032 Sixth Street,

referred to as the "old location". That policy by its terms provided coverage for loss up to $50,000.

The policy was a "reporting form" of policy, and was entitled "mercantile block floater" (RT 44; RT 91-96). It was a recent development in the insurance business and Miller had not had much experience with it (RT 17-19).

The insured was required by the new policy (Plaintiffs' Exhibit 6) to report to the insurance company on forms furnished by the company (Plaintiffs' Exhibits 5 and 7) the amount of his inventory on a monthly basis; the premium charged was based on the inventory and, according to the express terms of the policy—and the concession of the defendant—the premium is charged even though the amount of inventory reported *exceeds* the purported limits in the policy (RT 126-128 and paragraphs 11 and 13 of Plaintiffs' Exhibit 6).

Cordeiro quoted Miller's description of the block coverage as follows:

> ". . . he told me that this would be a policy in which we would be fully covered, one hundred per cent, no matter how much our inventory would fluctuate, we would report every month and if the inventory went up or down we would always be covered, we didn't have to worry about any other cases at all. He never stated any limitations at all to me."
>
> (RT 44:14-20.)

Hoffman, the defendant's expert on block coverage (RT 125), was present when Miller placed the block coverage policy on plaintiffs' store in April of 1963

and confirmed that the insured was not advised as to the limits of the insurer's liability.

Hoffman was asked (RT 140:7-13):

"Now, do you have any independent recollection, Mr. Hoffman, at the time you first met Mr. Cordeiro and first discussed with him this block coverage, any discussion at all on the subject of the limits of the company's liability in the event of damage by fire to property owned by Mr. Cordeiro and his partner? Or Mr. Cordeiro?"

The Witness: Yes.

Q. What was that discussion?

A. The limit of liability that was established.

Q. And did you tell them what limit of liability had been established?

A. No; we don't do that. It's up to the insured to establish the limit of liability."

(RT 140:14-21.)

* * * * * * *

"Q. All right. And on this particular occasion did Mr. Cordeiro tell you any specific amount of insurance that he was going to establish as the limit of liability on this policy?

A. I don't recall that."

(RT 141:8-17.)

The business prospered and the plaintiffs, in April of 1964, decided to buy out a furniture store—1105 Sixth Street—owned by Mr. Enos, located catercornered across the street, about 200 or 250 feet from the old location (RT 50).

Cordeiro called Harry Miller to come to discuss insurance (RT 52:3-9), and testified as follows respecting his meeting with Miller:

"Q. First of all, where did the conversation take place?

A. At our store when I called Harry. The first time I called Harry we were in the process of buying the store and at that time I talked about the insurance with Mr. Enos that we would have our own and I told Harry that we were going to buy the furniture store but that we were going to combine the furniture and appliances together and operate the store and that I was to move my office and everything to the furniture store and then we would keep the other store as-is, with giftware, records and housewares business with the two women. That is the extent of the conversation at that time."

(RT 53:2-15.)

That conversation was not denied by Miller.

Hoffman came down to assist Miller in placing insurance on the new location, 1105 Sixth Street, and met with Miller and the plaintiffs at the new location (RT 32).

Concerning this meeting Miller testified (RT 33:11-20):

"This is going back two years ago. I can't remember word-by-word. We discussed the coverage to some degree. It was pointed out that the heavy appliances and the stereos and everything was being moved over to the store and that's what they were doing at the time.

Q. Who pointed that out to whom, sir?

A. There was Mr. Hoffman of American Home, there was myself, there was Mr. Cordeiro and there was Mr. Lewis and I can't recall

whether Mr. Cordeiro was talking at the time or whether Mr. Lewis was talking at the time."

Miller was further examined:

"Q. Just one or two questions, Mr. Miller. On the cross-examination, Mr. Miller, you stated that there were white goods, televisions and stereos at the new location when you were there with Mr. Hoffman and Mr. Cordeiro; is that correct?

A. That is correct."

(RT 35:20-25.)

"Q. Now, Mr. Miller——

A. They were moving things in.

Q. ——what do you mean by 'white goods'?

A. Well, refrigerators, freezers, washing machines, dryers, all the appliances that they handle.

Q. At the time that you were having your conversation, your conference there—incidentally, will you fix the time; approximately was that in April of 1964?

A. That is correct."

(RT 35:20 to RT 36:9.)

Plaintiff Cordeiro testified as follows concerning the meeting of April, 1964:

"A. When Mr. Hoffman came down, I was at the old store at the time and they met me there and we talked over there and walked across the street to the other store, so he could see the location and what we had there and what we were going to do and that's what we showed him.

Q. All right. Now, will you tell me the conversation you had with Mr. Hoffman or the con-

versation with Mr. Miller when Mr. Hoffman was present on the subject of insurance?

A. At that time, we stated we wanted the same insurance again; in other words, we were talking about the block form, and they said they would give us the same coverage. In fact, I told them that day we had the inventory complete and the equipment complete, because Mr. Enos and I had just finished the inventory and we had a complete form that we handed to Mr. Miller and Mr. Hoffman got it that day, in fact. It was the inventory of the new place now, only; we were talking about the furniture only and the equipment I bought from Mr. Enos.

Also, that day I explained to them that we were moving——

Q. Explained to whom?

A. Mr. Hoffman and Mr. Miller

Q. Yes.

A. ——that we were moving. In fact, I showed them the TVs and the stereos, how we displayed them with the furniture and how we tied in the furniture and the appliances together and we were going to run one operation there and we would be moving everything over—in fact, that day we were.

Q. When you say 'moving everything over', did you say where you were going to move it to?

A. The appliance and furniture store.

Q. All right. Now, when you got over to the furniture store what, if anything, was there?

A. Already we had, that one wall when you come in there on the K Street side of the building, we already had complete washers and dryers on the full wall, plus we had the ranges there already and we had two Hallmarks, which is just

a brand name, but two Hallmarks, which were on the right-hand side.

Q. What are Hallmarks?

A. They're custom ranges; they're worth about $500 apiece.

Q. How many of them did you have there?

A. Two already there, sir. And we had, of course, our full line of TVs and stereos there already in the store.

Q. Now, how many TVs and stereos did you have there when Mr. Hoffman got there?

A. We're talking about probably 25 pieces.

Q. Now, you mentioned white goods, how many pieces of white goods were there when Mr. Hoffman got there?

A. Already we had probably there, the day we was moving, against that wall, we had 15 pieces of white goods there already; that's between your washers, dryers, ranges and the Hallmarks were there presently, besides what Eddie was bringing in that day.

Q. All right. Did you tell Mr. Hoffman what you were going to leave in the old store, the old location?

A. I just told him we were going to bring out appliances and run our furniture and appliances together in the new location, that we were just going to keep the inventory, as far as the other was concerned, strictly housewares, small appliances, records and giftware.

Q. Now, did Mr. Hoffman say anything about whether or not his company would cover you?

A. There was no doubt in my mind that we were——

Q. Well, what did he say? Did he say anything about the form of insurance?

A. That the block policy, of course, was the best and that is what we were going to get, just going to tie them all in as one."

(RT 54:7-57:5.)

Hoffman testified that he was aware that "appliances" were being moved into the new location, but stated he did not know how many items were being moved in (RT 157:10-22), and, in any event, neglected to inform himself as to how many or to tell his employer, the defendant, that *any* appliances were being moved (RT 157:3-6).

Hoffman testified that to him "appliances" meant stoves, washing machines, refrigerators, radios, television, and conceded, further, that the principal value of the inventory of the plaintiffs' business was in its line of appliances (RT 134:12-136:4).

Indeed the "mercantile block floater" issued as Rider No. 1 in the original policy (Plaintiffs' Exhibit No. 6) described the property insured as "consisting principally of appliances".

Endorsement No. 1, dated April 30, 1964, added the new location and changed the description of the property insured to "appliances and furniture" and purported to limit the coverage to $25,000 on the new location. Cordeiro never saw the endorsement and the first knowledge he had that there was a limit of $25,000 at the new premises came after the fire which destroyed them on November 2, 1964 (RT 58).

The defendant's own records (Plaintiffs' Exhibit 8) showed that *all* the value of the insured property was

allocated by defendant to appliances in 1964 during April ($54,611.71), May ($51,718.20), June ($54,-307.56), July ($73,183), August ($77,588), September ($77,480) and October ($47,080.96).

This schedule (Plaintiffs' Exhibit 8) was prepared and signed by the defendant's officers (RT 110) and was based on the reports which the plaintiffs, on forms furnished by defendant, had sent in to the defendant (Plaintiffs' Exhibit 7).

The defendant at no time ever objected to the form of monthly report submitted by the plaintiffs (RT 107:4-6). Five reports (including revision) had been received by defendant between the time the new store was added and the time it was destroyed by fire on November 2, 1964.

The only substantial conflict in the evidence involved the question of whether Hoffman told Cordeiro that the limit of coverage at the new location was to be $25,000.

Hoffman testified he told Cordeiro the limit would be $25,000 (RT 158), although he had previously testified that it was not customary to tell the insured anything at all about the limit of liability (RT 140: 18-21).

Cordeiro testified that Hoffman did not inform him the limit of liability was $25,000 (RT 75) and that he "kind of left it up to Mr. Miller and Mr. Hoffman to take care of that part of it" (RT 70:3-5).

The trial court found that "during . . . negotiations" Hoffman told Cordeiro that "the limits of lia-

bility on the fire insurance on the new location was $25,000.00" (CT 84:16-20).

There was no finding that Cordeiro knew or understood or appreciated the significance of what Hoffman was found to have said concerning the limits.

Hoffman testified (over objection) that because of the nature of the new location he had no authority to approve insurance coverage on it for as much as $50,000 (RT 159:12-21).*

Hoffman testified he did not tell Cordeiro that there was any limit on Hoffman's authority (RT 166:16-167:1).

Finally, Hoffman testified that he assured Cordeiro that he was getting "the best possible coverage" (RT 154:20-24) at the new location and that at the new location "I told him he had the same coverage that he had at the first location" (RT 155:2-3).

On November 2, 1964, fire destroyed the new location. Plaintiffs' agreed property loss was $42,185.35. Defendant paid plaintiffs only $25,000 and the plaintiffs sought through this action to recover the balance of $17,185.35 (CT 85:8-12).

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*The binder order (Defendant's Exhibit F) contemplated that Hoffman would inspect the premises; the report of his inspection (Defendant's Exhibit H) refers to the building as being a "three-story brick bldg. in good repair" with "housekeeping satisfactory"; there is no limitation of liability mentioned in the exhibit; Hoffman's written orders (Defendant's Exhibit E, presumably written at a time when Hoffman had forgotten that the appliances were being moved)—which were not communicated to the plaintiffs—is the only reference in the defendant's records to a $25,000 limit on the insurance; after the fire, the defendant issued a policy with $50,000 limits on yet a third site some four months before the site was given an inspection (RT 219:9-224:7).

It is our contention that both Miller, the defendant's general agent, and Hoffman, the defendant's special agent, knew that the appliance line was being moved from the old location to the new location, that defendant was aware such line constituted the principal value in the plaintiffs' inventory, that the plaintiffs informed the defendant's agents that they were in fact moving the appliance line to the new location, that the plaintiffs were assured by defendant's agent that they had the "best possible coverage" at the new location and that such coverage was "the same coverage that" the plaintiffs "had at the first location", that it was never brought home to the plaintiffs that the endorsement extending coverage to the new location carried limits of $25,000 (or any other limits) and that after the bargain for coverage was struck the plaintiffs on at least five different occasions before the fire submitted written reports on forms furnished by the defendant (Plaintiffs' Exhibit 7) which required the plaintiffs to make a *"statement of values wherever located"* and led the plaintiffs additionally to believe that they were covered to the extent of their reported inventory *"wherever located"*.

To a further discussion of these facts and to the principles of law on which we rely for a reversal we now turn.

V. ARGUMENT.

1. WHERE REPRESENTATIONS OR CONDUCT OF AN INSURER OR ITS AGENTS HAVE LED AN INSURED TO BELIEVE THAT IT WAS COVERED FOR A PERIL TECHNICALLY AND FORMALLY EXCLUDED FROM THE COVERAGE AFFORDED IN THE POLICY, THE INSURER WILL BE ESTOPPED TO DENY COVERAGE.

It was argued by defendant (CT 60-66) that the doctrine of estoppel could not be used to extend coverage to perils technically excluded from coverage under the formal provisions of an insurance policy.

Defendant's position is contrary to established law in this jurisdiction.

As stated in *Ivey v. United National Ind. etc.* (C.C.A. 9th Cir. 1958), 259 F.2d 205:

> "Whatever may be the rule elsewhere, the California decisions dealing with the problem now presented to us indicate that under the law of that state an insurance company may by its conduct or dealings apart from the policy itself be estopped from denying that coverage has been furnished for a risk which the insured has been led to believe is protected under the policy".

The rule was recognized in *Beach v. USFG* (1962), 205 C.A.2d 490, where the court said at page 416:

> "Under the principles laid down in *American Surety Co. v. Neise,* 136 Cal.App.2d 286 [289 P.2d 103]; *Mercer Cas. Co. v. Lewis,* 41 Cal.App. 2d 918 [108 P.2d 652]; *Bass v. Farmers Mutual Protective Fire Ins. Co.,* 21 Cal.App.2d 21 [68 P.2d 3062]; and *Golden Gate Motor Transport Co. v. American Indem. Co.,* 6 Cal.2d 439 [58 P.2d 3742], we conclude—where, as here, one, while negotiating for coverage with the insurer's

> agent, properly brought all of the material facts relative to the transaction to his attention and specifically requested insurance coverage based thereon, was assured by the agent that such coverage could be, would be, and had been effected, and relied upon the agent's representation with the latter's knowledge, but through the agent's failure and neglect actually was not covered—that the insurer, chargeable with the knowledge and acts of his agent, may be estopped thereafter to rely upon the existence of those facts to deny or defeat coverage."

In *Owen v. American Home Assurance Company* (D. Ct. Calif. No. Dist. 1957), 153 F. Supp. 928, Judge Halbert, speaking of the defendant insurer's agent, stated: "What he said and what he did, led the plaintiffs to believe that they would be covered" (153 F. Supp. 930).

In decreeing estoppel the court continued:

> "The law in California is clear that where an insurance agent gives a *misleading, incorrect* or *incomplete* answer, without qualification (even though, perhaps, carelessly made) to a specific question by a prospective insured concerning coverage, the insurer is not, after reliance has been placed thereon by the insured, allowed to deny liability on the basis of a provision which is contrary to, and does not truly reflect, the representations of the agent" (citing many cases).

In *Tomerlin v. Canadian Indemnity Co.* (1964), 61 C.2d 638 at 645, the court quoted and approved *Raulet v. Northwestern etc. Insurance Co.* (1910), 157 Cal. 213, 230, as follows:

> "'The insured usually confides implicitly in the agent securing the insurance, and it is only just and equitable that the company should be required to call specifically to the attention of the policy-holder [limitations upon the agent's authority].'"

The court concluded that the case before it was "essentially one of promissory estoppel" (61 C.2d at 649). See also, *Ames v. Employers Casualty Company* (1936), 16 C.A.2d 255 at 267, holding the doctrine obtains even though there has been "no meeting of minds".

"The elements of prior dealing and transactional continuity" in a case where there had been "representations on the part of the agent that similar coverage would again be provided" were held by the California Supreme Court in *Granco Steel, Inc. v. Workmen's Compensation Appeals Board* (1968) 68 Adv.Cal. 191, to be significant factors in determining that the doctrine of estoppel would bar an insurer from denying coverage.

See also analogous principles in the cases dealing with reformation such as *Modica v. Hartford, etc.* (1965), 236 C.A.2d 588; *Maier Brewing Company v. Pacific National Fire Insurance Company* (1963), 218 C.A.2d 869, and *Laing v. Occidental Life Insurance Company* (1966), 244 C.A.2d 811.

In order to allay any doubt that the doctrine of estoppel is applicable we have mentioned the legal principles under which we invoke the doctrine.

We turn now to a discussion of the facts which, we submit, require a finding of estoppel under the controlling rules of law, the undisputed evidence and the written instruments issued by defendant to the plaintiffs.

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2. DEFENDANT IS ESTOPPED AS A MATTER OF LAW TO DENY COVERAGE IN AN AMOUNT SUFFICIENT TO INDEMNIFY PLAINTIFFS FOR THE CONCEDED AMOUNT OF THEIR LOSS OVER AND ABOVE THE AMOUNT DEFENDANT CLAIMS IS PAYABLE UNDER THE POLICY AS WRITTEN; THE CONTRARY FINDING (CT 85:27-29) IS ERRONEOUS AS A MATTER OF LAW.

Preliminarily, we suggest that a finding of no estoppel is actually one of law, "since it was based at least in part upon the application of a legal standard." *Kippen v. American Automatic Typewriter Company,* 324 F.2d 742 at 745 (9th Cir. 1963).

A comment on that case in 55 Calif. L.R. 1020, "Law–Fact Distinction", by Stephen A. Weiner, notes (at page 1055) that "the rule of free re-reviewability in *Kippen* is sound . . . because an appellate court should not be compelled to defer to a trial judge's application of law based on experience with human affairs".

Furthermore, since the question of whether there was an estoppel turns largely on the construction and effect of written instruments (Plaintiffs' Exhibits 5, 6 and 7 and Exhibit 9 for identification) and certain undisputed evidence, this Court is not bound by the determination of the trial court. *Estate of Wunderle,*

30 Cal.2d 274 at 280 (1947); *Trubowitch v. Riverbank Canning Company,* 30 Cal.2d 335 at 339 (1947); *Parsons v. Bristol Development Company,* 62 Cal.2d 861 at 865 (1965); and California Evidence Code § 310.

We respectfully direct this Court's attention to the role of defendant's agent Miller, to certain undisputed evidence, and, particularly, to the form of report (Plaintiffs' Exhibits 5 and 7) furnished by defendant for use by the plaintiffs and suggest that the finding of no estoppel, based on the claim that Hoffman told Cordeiro there were limits of $25,000, ignores the role of Miller, certain undisputed testimony of Miller, Hoffman and Girdlestone, and the undisputed evidence of events which occurred *after* Hoffman's claimed warning to Cordeiro.

We point out the following facts which are either conceded or established by uncontroverted evidence:

(i) Defendant was aware that the principal value of plaintiffs' stock in trade, which it insured for $50,000 at the old location (Rider No. 1 of Plaintiffs' Exhibit 6), consisted of appliances.

(Girdlestone: RT 97:4-98:2; Hoffman: RT 134:12-135:4.)

(ii) Cordeiro informed defendant's agent Miller that it was plaintiffs' intention to move the appliances to the new location (RT 53:2-15).

(iii) Miller testified he was aware that the appliances were being moved to the new location (RT 35:20-36:13).

(iv) Miller testified that Cordeiro or Lewis told defendant's agent Hoffman in Miller's presence that the appliances were being moved to the new location (RT 33:9-20). Cordeiro's testimony was in accord (RT 54:7-57:5).

(v) Hoffman testified he was aware that appliances were being moved to the new location "on display, for sale" (RT 146:15-147:5).

(vi) Although aware that appliances were being moved, Hoffman made no effort to ascertain how many appliances were being moved and neglected to inform the defendant that any appliances were being moved (RT 157:3-20 and 161:14-24). Concerning the appliances Hoffman was asked, "How many did they say they were moving in?" and answered, "I don't know" (RT 161:23-24).

(vii) Hoffman testified that he did not tell Cordeiro of the secret limitation imposed by defendant on Hoffman's authority which purportedly limited that authority to insure property at the new location for only $25,000 (RT 161:2-12).

(viii) Had Hoffman advised Cordeiro that he had no authority to insure property at the new premises for any amount in excess of $25,000, Hoffman would have driven home to Cordeiro the knowledge that the defendant was either unable or unwilling to afford adequate coverage.

(ix) Instead of revealing to Cordeiro the existence of the secret limitation on his authority (as required by *Tomerlin* and *Raulet, supra*) Hoffman ad-

mitted he told Cordeiro he was getting "the best possible coverage" (RT 154:20-24) at the new location and assured him that "he had the same coverage that he had at the first location" (RT 155:2-3), where the limit was concededly adequate.

(x) The form of report (Plaintiffs' Exhibits 5 and 7) defendant delivered to plaintiffs and instructed plaintiffs to use and its use by plaintiffs and its receipt and retention by defendant *without objection* on at least five separate occasions between the time the new premises were added and the time of the fire constituted an affirmative, continuing representation to the plaintiffs that they were insured at least up to the values listed *"wherever located"* and estopped defendant from denying coverage for the reported inventory "wherever located".

We have restated at some length the evidentiary predicate for our contention that the defendant is estopped as a matter of law in this action to deny plaintiffs the coverage which they needed, requested and were led to believe that they had received.

We are not here to reargue the evidence on the question of whether or not Hoffman told Cordeiro "that the limit of liability on the fire insurance on the new location was $25,000" (CT 84:16-20).

The trial court made no finding that Cordeiro understood or appreciated the significance of Hoffman's statement (assuming it was made) and if the statement was heard by Cordeiro it was undoubtedly dis-

missed by Cordeiro as being without significance as establishing only an initial value or "provisional limit" which would be automatically increased after reports of inventory were made to the insurer, on forms furnished by the insurer, showing the "statement of values wherever located".

In this connection it must be recalled that Miller told Cordeiro (RT 44:14-20), "no matter how much our inventory would fluctuate, we would be covered, we would report every month and if the inventory went up or down we would always be covered . . .".

Having chosen a form of report from which the insured would reasonably conclude that property subject to the "multiple perils" described in the title of the report was covered "wherever located" when an unambiguous form of report was readily available (Plaintiffs' Exhibit 9 for identification, Standard Form Bureau Form 448), defendant must take the consequences of the ambiguity inherent in the form of report when read in light of all of the circumstances, particularly the assurances of Miller and Hoffman.

The form of report which the defendant required the plaintiffs to use contained no provision whatsoever for reporting difference addresses at which the insured property was kept. Plaintiffs' Exhibit 9 for identification, on the other hand, had defendant elected to use it, would have instantly put the assured on notice that values should be segregated as between the various premises described in the policy. Such a form would again have brought to the immediate attention of the defendant and its agents that more inventory

was being carried at the new location than was covered by its policy as amended.

In this connection we respectfully submit that it was error for the court to exclude Plaintiffs' Exhibit 9. Evidence of the custom or usage in a business or industry, i.e., the practice of others similarly situated or performing similar acts under similar conditions, is admissible to establish the standard of care in a given instance. *Hartford Accident and Indemnity Company v. Bank of America* (1963) 220 C.A.2d 545 at 561; see also "California Evidence" (2d Edition) by B. E. Witkin, San Francisco 1966, page 317.

Examination of the "mercantile block floater" (Rider No. 1) on the policy (Plaintiffs' Exhibit No. 6) might not have done much to clarify matters.

Thus, under paragraph 1 the "property insured" includes (last line) "the property of the insured wherever located". In paragraph 2 the policy recites: "This company shall not be liable under this policy for more than 100% of the following limits of liability in any one casualty or disaster: (a) $50,000 at 1032 - 6th Street, Los Banos, California".

Those recitals, had they been read by the assured, would suggest that initially there was property at 1032 6th Street, Los Banos insured for $50,000, that the company under paragraph 1 agreed to insure "wherever located", suggesting that if the property is moved from the place where it is originally described it will be insured "wherever located".

Paragraph 13 is equally mystifying to the unlearned: It relates to the so-called "full reporting"

requirements of the policy and provides that the liability of the company "shall in no event exceed a greater proportion of such loss or damage than the total value last reported by the Insured prior to such loss or damage bears to the actual values at risk hereunder as of the date for which such report was made. Any loss in excess of the limits of liability stated in this policy shall be borne by the Insured or by such other insurance to the extent of such excess, notwithstanding the requirement that premium is to be adjusted on the basis of full values reported."

What is meant by the phrase "such other insurance"? The policy itself has just informed the assured in paragraph 1 that the property of the insured is insured "wherever located", its initial location obviously being 1032 - 6th Street, Los Banos, California. If the amount of inventory is increased and reported (as was done in this instance) the assured has been advised both by the express terms of the policy and by the insurer through its agents that the amount of insurance will increase. To the non-expert mind that is "other insurance".

If some more esoteric definition of "other insurance" than that was intended by the insurer, it was up to the insurer to drive home such meaning in clear, unmistakable terms.

For years the insurance industry has invoked the doctrine of *uberrimae fidei (Stipcich v. Metropolitan Life Insurance Company* [1927] 277 U.S. 311 at 316) to saddle the assured with the highest duty to report to the insurance company anything which touches upon or affects the risk.

Failure of the assured to take an active role, to seek out and pass on to the insurer items pertaining to the risk, was always held to bar the assured from obtaining the benefits of his supposed bargain.

Modern developments in the law of insurance have established, however, that the doctrine of *uberrimae fidei* is a two-way street: If there is something about the proposed contract which would place the assured in the peril of non-coverage, there is an affirmative obligation on the insurer to speak out in no uncertain terms that will warn the assured of the peril of non-coverage.

In this case the defendant has claimed a limitation on its liability for loss of appliances kept at the new location.

The inquiry under current doctrines is whether there has been "an *understanding consent* of the consumer to any limitation of liability", as stated in *Steven v. Fidelity & Casualty Company* (1962), 58 C.2d 862 at 883.

In *Gray v. Zurich Insurance Company* (1966), 65 C.2d 263, the Supreme Court of California stated: "We test the meaning of the policy according to the assured's reasonable expectation of coverage" (p. 267).

The extended contacts between the plaintiffs and the defendant's agents at a meeting held for the purpose of solving the plaintiffs' insurance problems, render singularly pertinent a passage from *Steven* quoted in *Gray* (65 C.2d 263 at 271):

> "If [the insurer] deals with the public upon a mass basis the notice of non-coverage of the policy, in a situation in which the public may reasonably expect coverage, must be conspicuous, plain and clear."

If there is an "ambiguity" in documents used by the insurer or oral representations made by the insurer's agents, the insurer and not the insured must take the consequences.

The insurance cases involving the principle are discussed in an exhaustive article by Mr. Justice Matthew Tobriner and Joseph R. Grodin, Esq. in 55 C.L.R. 1247 at 1273 et seq., "The Individual and the Public Service Enterprise in the New Industrial State".

Whether the representations are oral or written or both can make no difference: The cases hold there is an affirmative duty on the part of the insurer to bring home to the attention of the insured the circumstances in which he is to be denied the coverage he has been led to believe he was getting.

Again, the cases cited under point 1, supra, hold that oral representations by an agent on the subject of coverage conclude the insurer just as completely as written representations.

Finally, it will not do to argue that "silence cannot result in an estoppel"—as urged by the defendant at the trial of the action—because under existing law the duty of an insurance company toward its assured cannot be discharged by silence.

We would not be in Court today if Hoffman had said to Cordeiro: "I have authority to insure your inventory in the new store for only $25,000; that may be insufficient for your operation; you had best get additional insurance somewhere else."

We turn now to additional propositions of law briefly touched upon before but which we now state separately for emphasis.

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3. THE FAILURE OF THE PLAINTIFFS TO READ THE ENDORSEMENT TO THE INSURANCE POLICY CANNOT BE MADE A PREDICATE OF THE DEFENDANT'S CLAIM OF NO COVERAGE.

The trial court found (CT 84:26-31) that the policy was "delivered to plaintiffs" and that "neither plaintiff ever read the endorsement prior" to the fire loss which destroyed their inventory of appliances at the new location.

That finding will not sustain a holding of non-coverage.

As stated in 27 Cal.Jur.2d 688, Insurance § 200:

> "Ordinarily, it is presumed that persons are familiar with the terms of written contracts to which they are parties, and in the absence of fraud they are justly bound by the provisions thereof. But it is well known that a comparatively small number of insurance policyholders read a policy in its entirety. Ordinarily, the policyholder makes little more than a superficial ex-

amination at the time the policy is issued. Hence the presumption is not strictly applied to insurance policies. For example, when a person applies for insurance giving him a particular coverage and the insurer agrees to write the policy so as to give that coverage, the insured is entitled to rely thereon, and his failure to read the policy will not relieve the insurer or its agent of the duty to write it as requested."

In *National Automobile and Casualty Insurance Company v. Industrial Accident Commission* (1949), 34 C.2d 20, the court stated (p. 26):

"The rule is settled in this state 'that the mere failure to read an insurance policy does not militate against its reformation upon the ground of mutual mistake.' (*Payne v. California Union Fire Ins. Co.,* 129 Cal.App. 582, 586 [19 P. 2d 40].) (See, also, *Golden Gate Motor T. Co. v. Great American Indem. Co.,* 6 Cal.2d 439 [58 P.2d 374]; *Hercules Gasoline Co. v. Security Ins. Co.,* 122 Cal.App. 499 [10 P.2d 128]; *Calfornia Packing Corp. v. Larsen,* 187 Cal. 610, 614 [203 P. 102]; *Los Angeles & Redondo R. Co. v. New Liverpool S. Co.,* 150 Cal. 21 [87 P. 1029]; *Travelli v. Bowman,* 150 Cal. 587 [89 P. 347]; *Sullivan v. Moorhead,* 99 Cal. 157 [33 P. 796]; *S. E. Slade Lbr. Co. v. National Surety Co.,* 128 Cal.App. 419 [17 P.2d 775]; *Cantlay v. Olds & Stoller Inter-Exch.,* 119 Cal.App. 605 [7 P.2d 395]; 22 Cal.Jur. 726.)"

To the same effect see *Modica v. Hartford, etc.* (1965) 236 C.A.2d 588 at 596, *Maier Brewing Company v. Pacific National Fire Insurance Company*

(1963) 218 C.A.2d 869 at 876 and *Laing v. Occidental Life Insurance Company* (1966) 244 C.A.2d 811 at 818-819.

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4. **WHERE NEGOTIATIONS BETWEEN THE ASSURED AND THE AGENT HAVE, IN THE LIGHT OF ALL THE EVIDENCE, LED THE INSURED TO BELIEVE THAT HE WAS COVERED FOR A PERIL WHICH IS TECHNICALLY EXCLUDED IN THE POLICY OR ENDORSEMENT AS WRITTEN, THE POLICY OR ENDORSEMENT WILL BE REFORMED TO EXPRESS THE "OBJECTIVE" INTENT OF THE PARTIES IN SUCH A MANNER AS TO PROVIDE THE COVERAGE THE ASSURED HAD A REASONABLE EXPECTATION OF RECEIVING.**

We have discussed above several of the *estoppel* cases and note that the same principles entitle the insured to *reformation.*

In estoppel the policy is not changed; the insurer is merely denied the right to stand on an exception or term or limitation as written into the contract; in reformation the contract is rewritten to express the intent of the parties as "measured by the objective standard". *Maier Brewing Co. v. Pac. Nat. Fire Ins. Co.* (1963) 218 C.A.2d 869 at 874.

It will not do to argue that the defendant's—or Hoffman's—*subjective* intent was controlling. Subjectively, Hoffman (so he said at the trial) did not intend to afford coverage for any amount in excess of $25,000. If matters of coverage were to be determined by the subjective intent of one of the parties there would be few cases where reformation is allowed.

The meeting of Cordeiro, Hoffman and Miller at Los Banos in April 1964 was not held for fun. It had a serious purpose. As stated in California Civil Code

3400, contained in the article on reformation, "It must be presumed that all of the parties . . . intended to make an equitable and conscientious agreement".

It is obvious that Cordeiro—according to his testimony and according to all inferences that can be drawn from any of the evidence in the record—turned to Miller who turned to Hoffman for help in solving plaintiffs' insurance problem.

The trial court found (CT 84:22-24) that Cordeiro "never specifically requested insurance in any greater amount at the new location than $25,000". It will not do to construe that as a finding that Cordeiro requested coverage in the amount of $25,000 because Cordeiro never requested insurance in any specific amount at all. He wanted protection for his business and turned to the insurance industry for expert help.

Judged by the *objective* standards by which negotiations of this nature must be weighed, Cordeiro had every reason to think he was covered. He had done his best to show defendant's agents what his problem was; if they didn't know how to cover it, no one did; they had sold him a form of insurance—"the best possible coverage"—without pointing out to him the significance of the coverage limitations as understood by the experts.

Our case as developed by the evidence is strikingly similar to *Modica v. Hartford, etc.* (1965) 236 C.A.2d 588, in which reformation was allowed.

In the *Modica* case the insured only requested of the insurer's agent "cover me for business" (236 C.A.2d

592); agents for the insurer told him that "you have good coverage". The agent had familiarized himself with the assured's problem and told him "I will see that you are covered", and "You are covered" (236 C.A.2d 592) and that "he had nothing to worry about" (idem 593). The court noted (236 C.A.2d 593) that the insured "did not specifically instruct" the insurer's agents "to write property damage insurance for him" (Compare with finding VIII, CT 84:22-24).

The insurer in *Modica* issued a policy which covered *liability for bodily injury* and gave *protection for loss by fire* but provided *no coverage for liability for property damage.*

Fire broke out in the premises leased by the assured, damaging the freehold and the property of adjoining tenants. The landlord and the adjoining tenants sued the assured, who brought action to have his policy reformed so as to provide suitable protection for property damage liability.

The court reformed the policy, adding property damage liability coverage with adequate limits. In affirming judgment for the assured, the appellate court stated: "An insurance policy may be reformed to show the premises intended to be covered" and "the amount payable", and that the amount payable, even though never discussed, would be fixed at what "it would be reasonable to say in the circumstances" *(idem* 596).

In the *Maier* case, supra, agents for the defendant insurer informed the assured that it was getting cov-

erage "as broad or broader" than it had previously had. A policy was issued—and never read by the assured—which omitted from the description of the insured premises an area on which was stored property worth $318,000, which was destroyed by fire. The insured sought to have the insurance contract reformed to include the omitted premises. The insurer defended on the ground that there had been no "meeting of the minds" because neither the insurer nor its agents "had the property in mind prior to the fire" (218 C.A.2d 869 at 874).

In affirming a judgment decreeing reformation to include the omitted area the appellate court said: "Courts are not interested in the subjective intent of the parties, but only in their objective intent—that is, what would a reasonable man believe from the outward manifestation of consent . . . Mere failure to read an insurance policy does not militate against its reformation upon the ground of mutual mistake."

We submit that, judged by the *objective* formula requirement, the plaintiffs as reasonable men had a right to believe they were adequately covered, and were entitled to reformation, whether the limits were in a fixed amount, as claimed by the defendant, or in an amount for which they were charged and which varied, up or down, in accordance with report of inventory.

5. **A LIMITATION IN AN INSURANCE POLICY DENYING COVERAGE WHERE A REPORTED INVENTORY EXCEEDS A PRESCRIBED LIMIT OF COVERAGE WILL BE IGNORED AS CONTRARY TO PUBLIC POLICY WHERE THE EXPRESS TERMS OF THE POLICY MEASURE THE AMOUNT OF PREMIUM BY THE AMOUNT OF INVENTORY REPORTED EVEN THOUGH SUCH INVENTORY EXCEEDS THE PURPORTED LIMITS.**

As we have pointed out in the statement of facts, the form of policy issued by the defendants in this matter requires the assured to submit on forms furnished by the insurer his monthly inventory. The value of the inventory as so reported determines the premium. By the express terms of the policy the premium is exacted even though the amount of reported inventory *exceeds* the purported limits of the policy.

We submit that to charge the assured for coverage under the terms of one paragraph of the policy and to deny him that coverage under the terms of another paragraph of the policy is contrary to public policy and that the limitation of coverage will fall.

To paraphrase Judge Harrison in *Wallace, et al. v. World Fire and Marine Insurance Company* (D. Ct. Calif. 1947) 70 F. Supp. 193, affirmed (C.C.A. 9th, 1948) 166 Fed.2d 571, we suggest that an insurance company cannot "blow hot" when the figures are used to compute premiums and "blow cold" when they are relied upon to compute the company's liability.

The converse of the proposition was involved in the cited case: The assured wished to use his reported figures—which were low—in computing the premium

and to use a higher set of figures in computing liability. Judge Harrison stated:

> "They cannot blow cold when their figures are to be used to compute premiums, and blow hot when they are to be relied upon to compute the company's liability."

Payment of the premium and its retention by the insurer who (as in this case) was on notice of the facts, has always signaled to the insured that it was covered. *Ohran v. Nat'l. Automobile Ins. Co.* (1947) 82 C.A.2d 636 at 646. To allow the insurer to collect premiums for coverage not provided not only shocks the conscience but runs counter to the requirement that an insurance company must in all its dealings with its insured be fair and equitable. See the cases cited under point 2, supra.

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6. WHERE, AS HERE, THE BASIS FOR THE TRIAL COURT'S DECISION CANNOT BE ASCERTAINED FROM THE FINDINGS, THE JUDGMENT SHOULD BE REVERSED.

Why did the trial judge find against the plaintiffs?

He found that Hoffman told the plaintiffs that there was a $25,000 limit on the coverage. Was that the only duty the defendant owed?

There was, of course, no finding that the plaintiffs heard Hoffman tell them that or that they understood what he meant by that or that $25,000 was any more than an initial or provisional limit which would be automatically increased as the report of inventory was received.

There was no finding that Hoffman advised plaintiffs that in the event they moved into the new location appliances in excess of that value coverage would not automatically follow, as they had been led to believe it would when they reported their increase in inventory.

There is a finding that the plaintiffs did not read the policy. Is that why they were denied relief? We have shown that the failure to read a policy under the circumstances was without legal significance and the fact that the court made a finding on the point suggests that the court may have been of the opinion that the failure of the plaintiffs to read the policy barred them from recovery.

Did the trial court believe the plaintiffs were aware of the limit of $25,000? There is no finding that they either knew or should have known what the limit was.

Did the trial court feel the insurer discharged its duties to the assured, or that it had no affirmative duties, as argued by defendant?

It was and is our position that estoppel was established as a matter of law under all the circumstances. Again, specifically, the knowledge and representations of defendant's agents, coupled with the lack of insurance expertise or knowledge on the part of Cordeiro of any limitations in the policy or on the authority of defendant's agents and the "objective" appearance of coverage inherent in the circumstances and in the defendant's form of policy as well as its form of report, support this position.

VI. CONCLUSION

It is respectfully submitted that the judgment should be reversed and judgment entered for the plaintiffs in the amount of the prayer, or, alternatively, that the matter may be retried in the light of the principles above discussed.

Dated, San Francisco, California,
April 26, 1968.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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